Tan Teong Seng & Anor v Tang Eng Le Trading & Transport Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–30 OF 1999
ZALEHA ZAHARI J
28 MAY 2002

Civil Procedure *— Appeal — Fact, finding of — Road accident — Interference by appellate court — Trial judge did not hear evidence of witnesses but relied on recorded evidence of another trial judge — Contradictory versions as to how accident occurred — Whether trial judge erred in accepting defendants' version — Whether trial judge erred by ignoring material evidence*

Road Traffic *— Negligence — Road accident — Finding of fact by trial judge — Whether appellate court should interfere — Whether trial judge erred*

This was an appeal by the plaintiffs against the decision of the sessions court judge wherein the first plaintiff ('P1') was held to be 100% liable for an accident between P1's car and a motor trailer driven by the second defendant ('D2'). The sessions court judge who made the decision did not hear the evidence of the witnesses but relied on the recorded evidence of another sessions court judge. There were contradictory versions as to how the accident had occurred. According to P1, he was driving his car from Butterworth towards Taiping when D2's motor trailer, which was coming from the opposite direction, encroached onto P1's path and collided into his car. D2's version was that his car (travelling in the same direction) had collided into the back of his motor trailer.

Held, allowing the plaintiff's appeal:

(1) The general rule is that an appellate court would be slow to interfere with the findings of fact arrived at by a trial judge as the latter would have had the advantage of hearing the evidence and observing the demeanour of the witnesses. The general rule was not applicable in the instant case because the sessions court judge did not hear the evidence of witnesses (see p 319A–B).

(2) If indeed the defendants' case was that P1's car had knocked the motor trailer from the rear, this allegation should have been expressly pleaded in the statement of defence and during the trial, this issue should have been expressly put to P1 in cross-examination. The raising of the plaintiffs' direction of travel as an issue at the submission stage had clearly prejudiced the plaintiffs and it was not open for the defendants to do so at that stage of the proceedings. Accordingly, the Sessions Court erred in holding that P1 was travelling in the same direction as D2 and the sessions court judge should have held as a fact that the plaintiff was proceeding from the opposite direction as held out by P1

A and as admitted to by D2 in the traffic summons preferred against him (see p 323E–G).

(3) The sessions court judge had totally ignored the evidence of the glass splinters, which was favourable to the plaintiffs. The sketch showed that the glass splinters were mainly on P1's right of way. By ignoring this material piece of evidence, the sessions court judge had erred in failing to take into consideration, matters that he was bound to consider (see p 323G–H).

(4) Accordingly, the plaintiffs had discharged the onus of proving negligence on the part of the defendants and the defendants were thus wholly liable for the accident (see p 324B).

(5) As the parties had agreed on the quantum in respect of the injuries sustained by the plaintiffs, order in terms of the agreed quantum was made (see p 324F–G).

[**Bahasa Malaysia summary**

Ini adalah satu rayuan plaintif-plaintif terhadap keputusan hakim mahkamah sesyen di mana plaintif pertama ('P1') telah diputuskan sebagai bertanggungan 100% atas satu kemalangan antara kereta P1 dan sebuah treler yang dipandu oleh defendan kedua ('D2'). Hakim mahkamah sesyen yang membuat keputusan tersebut tidak mendengar keterangan saksi-saksi tetapi bergantung pada keterangan tercatat seorang hakim mahkamah sesyen yang lain. Terdapat versi yang bercanggahan berhubung dengan bagaimana kemalangan tersebut telah berlaku. Menurut P1, beliau sedang memandu keretanya daripada Butterworth ke arah Taiping apabila treler D2, yang datang daripada arah yang bertentangan, memasuki lorong P1 dan berlanggar dengan keretanya. Versi D2 adalah bahawa kereta P1 (yang bergerak dalam arah yang sama) telah berlanggar ke bahagian belakang treler beliau.

Diputuskan, membenarkan rayuan plaintif:

(1) Kaedah umum adalah bahawa sesebuah mahkamah rayuan akan lambat bertindak untuk mencampuri keputusan fakta-fakta yang telah dicapai oleh seorang hakim perbicaraan kerana mahkamah rayuan akan mempunyai kelebihan mendengar keterangan dan memerhatikan sikap saksi-saksi. Kaedah umum tidak terpakai dalam kes semasa kerana hakim mahkamah sesyen tidak mendengar keterangan saksi-saksi (lihat ms 319A–B).

(2) Jika sesungguhnya kes defendan adalah bahawa kereta P1 telah melanggar treler tersebut daripada belakang, dakwaan ini sepatutnya telah diplid dengan nyata dalam pernyataan pembelaan dan ketika perbicaraan, isu ini sepatutnya telah dengan nyata dikemukakan kepada P1 dalam pemeriksaan balas. Membangkitkan arah pergerakan plaintif sebagai satu isu di peringkat hujahan telah dengan jelasnya memudaratkan plaintif-

plaintif dan ianya adalah tidak terbuka untuk defendan-defendan melakukan sedemikian di peringkat itu akan prosiding tersebut. Sehubungan itu, mahkamah sesyen tersalah pertimbangan dalam memutuskan bahawa P1 sedang bergerak dalam arah yang sama seperti D2 dan hakim mahkamah sesyen sepatutnya telah memutuskan sebagai satu fakta bahawa plaintif sedang bergerak daripada arah yang bertentangan seperti mana yang dikemukakan oleh P1 dan seperti mana yang diakui oleh D2 dalam saman trafik yang dikemukakan terhadap beliau (lihat ms 323E–G).

(3) Hakim mahkamah sesyen telah sama sekali tidak menghiraukan keterangan mengenai serpihan kaca yang mana memihak kepada plaintif-plaintif. Lakar gambar menunjukkan bahawa serpihan kaca kebanyakannya terdapat dalam laluan sah P1. Dengan tidak mempedulikan keterangan penting ini, hakim mahkamah sesyen telah tersalah pertimbangan dalam gagal untuk mengambil kira, perkara-perkara yang mana beliau terikat untuk pertimbangkan (lihat ms 323G–H).

(4) Sehubungan itu, plaintif telah melepaskan bebanan membuktikan kecuaian di pihak defendan-defendan dan defendan-defendan adalah dengan itu bertanggungan sepenuhnya bagi kemalangan tersebut (lihat ms 324B).

(5) Oleh kerana pihak-pihak tersebut telah bersetuju atas kuantum berhubung dengan kecederaan yang dialami oleh plaintif-plaintif, perintah seperti mana kuantum yang disetujui telah dibuat (lihat ms 324F–G).]

Notes

For cases on finding of facts, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 814–819.

For cases on road accident, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 391–420.

Legislation referred to

Road Transport Act 1987 s 43(1)

Appeal from: Summons No 53–269 of 1996 (Sessions Court, Butterworth)

Thanasekaran (*A Tanasekhran*) for the appellant/plaintiff.
AJ Teoh (*AJ Teoh & Co*) for the responden/defendant.

Zaleha Zahari J: This is an appeal by the plaintiffs against the decision of the sessions court judge dated 22 February 1999, holding the first plaintiff 100% liable and dismissing the plaintiffs' claim for damages arising from an accident between motor car No WQ 5046 driven by the first plaintiff and motor trailer No PCV 4466 driven by the second defendant at Jalan Besar, Simpang Ampat on 9 November 1996 at about 3pm.

A In the consideration of this appeal, this court took note of the fact that the sessions court judge who made the decision which is the subject matter of appeal did not hear the evidence of the witnesses. It was heard by another sessions court judge, Mr Rungit Singh. The sessions court judge made his decision based on the recorded evidence of the previous sessions court judge and written submissions filed.

B In this situation, the general rule whereby an appellate court would normally be slow to interfere with the findings of fact arrived at by a trial judge by reason of the trial judge having had the advantage of hearing the evidence, observing the demeanor of the witnesses, does not accordingly apply. This court, in exercising its appellate jurisdiction in the consideration C of this appeal is in the same position as the sessions court judge who made the decision on the facts in issue in this case.

It is appropriate to set out the reasoning of the sessions court judge in arriving at the decision that he did.

D *The sessions court judge's decision dated 26 February 1999*

Haji Zainol Rashid bin Hussain's reasoning for dismissing the plaintiffs'case is as follows:

> E Setelah meneliti keterangan yang dicatatkan oleh Hakim Sesyen yang terdahulu dan penghujahan bertulis peguam plaintif dan peguam defendan, pada pemenuan fakta, mahkamah mendapati keterangan plaintif bagaimana kemalangan berlaku tidak dapat diterima. Jika diteliti gambar-gambar dan rajah kasar tidak mungkin kemalangan berlaku sebagaimana plaintif beritahu. Jika motor treler defendan masuk jalan plaintif dan bertembung, tidak mungkin kedudukan motokar plaintif dan motor treler defendan adalah seperti mana di dalam rajah kasar dan gambar. Motor treler adalah kenderaan F berat, jika ia bertembung dengan motokar sudah pasti ia akan menolak motokar plaintif ke hadapan.
>
> Tetapi dari rajah kasar dan gambar di dapat kedudukan motokar dan motor treler adalah bedekatan. Tidak mungkin juga motor treler defendan selepas pelanggaran boleh membelok dan memasuki jalanraya sepenuhnya. Tidak mungkin motor treler dapat membelok seperti kedudukan di dalam G rajah kasar dan gambar. Jika motor treler memasuki jalan plaintif dan melanggar plaintif, bagaimana dengan kehadiran motolori RB 4849.
>
> Defendan kedua di tuduh dan mengaku salah kerana melanggar motorlori RB 4849 dan bukannya kerana melanggar plaintif. Mahkamah terima versi defendan kedua bagaimana kemalangan berlaku. Defendan kedua telah melanggar belakang motorlori RB 4849 lalu terbabas ke dalam H parit. Defendan kedua telah terdengar sesuatu melanggar belakang motor trelernya. Mahkamah percaya plaintif yang terlanggar belakang motor treler defendan. Oleh itu tidak ada kecuaian yang di lakukan oleh defendan kedua.

The sessions court judge then proceeded to give his views on damages in respect of the injuries sustained by the plaintiffs. For the first plaintif, for I abrasion and laceration, he was of the view that RM2,300 was appropriate; for fracture at the distal end right tibia and fibula and residual disabilities he was of the view that RM18,000 was reasonable. For loss of earnings he

considered the sum of RM1900 a month for four months totaling RM7600 was appropriate. A

As for the second plaintiff, for fracture of the third left clavicle, he considered the sum of RM6000 as reasonable.

Liability B

I propose to set down the evidence which was before the court below in determining whether the sessions court judge was right in dismissing the plaintiffs' case and holding the first plaintiff 100% liable for the accident.

Tan Teong Seng (SP1) C

SP1, the frist plaintiff, testified that on 9 November 1995 at about 2.30pm, he was driving motor car WQ 5046 from Butterworth to Taiping with his son, the second plaintiff, as a passenger. Upon approaching Pekan Simpang Ampat a motor trailer No PCV 4466 coming from the opposite direction driven by the second defendant encroached onto his path and collided into him. He testified that he was then driving at about 40–50kmph. D

In cross examination, he testified that the traffic then was not very heavy. It was then not raining but he could not recall whether the road was wet. According to SP1, the first time he saw the defendants' motor lorry was about one to two lamp posts away and that it was then in its own lane. The oncoming trailer suddenly encroached on to his lane and collided into him. According to SP1, the right bumper of the trailer knocked into the right front lamp of his car. After the accident, his car was positioned across the road whilst the trailer was back on to his lane and entered into a drain. SP1 testified that he was not conscious of the presence of another small lorry at that point of time. E F

Tan Kheng Ee (SP2)

SP2's evidence was of no assistance as he did not know how the accident occurred.

G

Sjn Moy Wa Kong (IO (SP3))

The IO was called to testify on behalf of the plaintiffs. According to SP3, this accident involved three vehicles, a motor lorry (RB 4879), a motor trailer (PCV4466) as well as a motorcar (WQ5046). The sketch plan and key, exh 'P 1' (pp 85–86 of the appeal record) shows the position of the three vehicles involved in the accident. SP3 testified that the glass splinters, 'kebanyakkan bertaburan di kawasan di antara kedua-dua jalan, kebanyakkan sebab dengan kenderaan PCV 4466 dan WQ 5046'. H

According to SP3, the driver of motor trailer No PCV 4466 (the second respondent) was issued with a traffic summons under s 43(1) of the Road Transport Act 1987 to which charge the second respondent had pleaded guilty. I

The traffic summons preferred against the second respondent was produced before the court, ie Mahkamah Majistret Jawi No MS 86-616-96 (exh 'D4' pp 11–13 of the supplementary appeal record) confirming that the second respondent had pleaded guilty to a charge, fined RM800 and also had his license endorsed. According to the facts presented in support of the charge, the second defendant admitted to being negligent by following motor lorry RB 4879 which was ahead of him too closely and knocking into its rear as he was unable to stop his trailer in time after the driver of RB 4879 gave a signal of his intention to turn right. The facts presented in the traffic summons also made express mention of the plaintiff's car, WQ 5046 in the following terms:

> Dalam kemalangan ini juga sebuah kereta No WQ 5046 yang di pandu oleh Tan Teong Seng yang datang dari arah bertentangan iaitu Bkt Mertajam ke N/Tebal telah terlibat dan mengalami kerosakkan bahagian hadapan sebalah kanan di mana ia telah terlanggar pada motorlori tertuduh yang terbabas akibat kemalangan.

The IO testified that the damages of the vehicles involved in the accident are as follows:

(a) PCV 4466
- (1) Bumper kiri kanan kemek
- (2) Body kanan kepala tengah kemek
- (3) Ekzos pipe di tengah sebelah kanan bengkok
- (4) Lampu signal kiri depan pecah
- (5) Tangki sarong depan kemek
- (6) Mudguard depan kiri kemek

(b) WQ 5046
- (1) Bonnet depan kemek
- (2) Mudguard depan kanan terkoyak
- (3) Cermin depan pecah
- (4) Pintu depan kanan kemek
- (5) Bumbung depan kanan pecah
- (6) Bumper depan kemek
- (7) Mudguard depan kiri kemek

(c) RB 4849
- (1) Besi belakang atas papan bengkok

Salim bin Md Desa (SD1)

The second defendant's version in court is that upon arrival at Pekan Simpang Empat he saw a motor lorry ahead of him ahead of him stopping at the middle of the road. He applied his emergency brake and swerved to his left but was unable to stop in time as the road was slippery due to rain and ended up in the drain on the left side of the road. He then heard something knocking into him from the rear. Upon checking, he found no damage to the rear of his motor trailer but instead saw a car to the right of his trailer on the other side of the road.

In cross-examination, SD1 confirmed that he had pleaded guilty in the Magistrate's Court Jawi of knocking into motor lorry RB 4879 and motor

car WQ5046 (para B p 30 of the appeal record). He however denied that he was speeding at that point of time. He also denied that he skidded to the left ('membuang sebelah kiri' dan 'terbabas') as contained in his police report (p 70 of the appeal record) but instead state that he was still in control of his motor trailer and that he had swerved to his left.

At para E p 30 of the appeal record, SD1 denied knocking into the plaintiff's motor car WQ 5046. Thereafter, upon further cross-examination (p 33 of the appeal record), he then admitted to skidding after he had knocked into the motor lorry ahead of him.

The plaintiffs' counsel's written submissions in the court below is at pp 41–49 of the appeal record whilst the defendants' counsel's submissions is at pp 5–10 of the supplementary appeal record.

In their written submissions, the plaintiffs' counsel urged the court to reject the second defendant's version in court by reason of it being at variance with the police report which he had lodged. He submitted that the discrepancy between the second defendant's police report and that of his testimony in court relating to whether he was in control of his trailer or whether he had skidded to the left and lost control was a material difference affecting his credibility.

He submitted that the plaintiff's version of the accident is supported by the sketch plan and key and the photographs. According to him, the evidence is all consistent with encroachment by the second defendant trailer onto the path of the plaintiff's motor car. He laid stress on the glass splinters which were on the plaintiff's right of way. On the facts of this case, the plaintiff's right front lamp was broken and the place where the glass fragments fell indicates the point of impact.

In the circumstance as described by him, the plaintiffs' counsel submitted that the defendants were wholly liable and that the question of contribution on the part of the plaintiffs does not arise.

The defendants' counsel on the other hand, submitted that the accident could not have happened as alleged by the plaintiff. According to him, the credibility of SP1 is in doubt. From the position of the respective vehicles involved in the accident as shown in the sketch plan and the photographs, he was of the view that SP1 was not heading towards Ipoh as testified by him in court but was proceeding in the same direction as the defendant's motor trailer ie, that SP1 was following the second defendant trailer from behind. The defendant's counsel submitted that based on the evidence presented before the court, the plaintiff had failed to prove that this was a collision of two vehicles coming from the opposite direction and that on this ground, the plaintiffs' claim should be dismissed.

His alternative submission is that if indeed the plaintiffs were heading towards the direction of Ipoh, it was unlikely that a trailer which is long and heavy would encroach on the wrong side of the road, knock into a car, proceed back on to its own lane, then try to avoid a small lorry ahead of him and then end up in the drain. He submitted that what probably happened was that the lorry ahead of the second respondent (RB 4879) stopped abruptly. The second respondent applied his emergency brakes and as the

A road was wet due to rain, the plaintiff, who was following him from behind, could not stop his car in time and knocked into his rear. The court was urged to accept the defendant's version and to dismiss the plaintiffs' claim with costs.

The arguments presented before me at the hearing of this appeal were
B similar to the written submissions presented in the court below.

Findings

I would like to firstly deal with the issue as to which direction the plaintiffs' car was travelling. From the evidence on record, the sessions court judge
C accepted the defendants, version that the plaintiffs were travelling in the same direction as the second respondent and had knocked the trailer from the rear.

On this issue, this court notes that the direction in which the plaintiff was travelling, from Butterworth towards Taiping, was never made an issue.
D In making the decision that he did, the sessions court judge appeared to have totally ignored and disregarded the admission of the facts in support of the traffic summons to which the second defendant had pleaded guilty which had expressly made reference to the plaintiffs' vehicle coming from the opposite direction of the second respondent's motor trailer.

E I am of the considered opinion if indeed the defendants' case was that the plaintiff had knocked the trailer from the rear, this allegation should have been expressly pleaded in their statement of defence, and during trial, this issue should have been expressly 'put'to the first plaintiff in cross examination. In my view, the raising of the plaintiffs' direction of travel as
F in issue at the submission stage has clearly prejudiced the plaintiffs, I hold that it was not open for the defendants to do so at that stage of the proceedings. Taking into consideration the admitted facts in the traffic summons to which the second respondent had pleaded guilty, the nature of the pleadings as well as what transpired at trial, I am of the view that the sessions court judge had erred in holding that the plaintiff was travelling in
G the same direction as the second respondent but instead should have held as a fact that the plaintiff was proceeding from the opposite direction as held out by the first plaintiff and as admitted by the second respondent in the traffic summons preferred against him.

Coming now to the silent evidence of the glass splinters. The sessions
H court judge appeared to have totally ignored this piece of evidence which is favorable to the plaintiffs. The sketch plan clearly shows that the glass splinters were mainly on the plaintiffs right of way. By ignoring this very material piece of evidence I find that the learned sessions court judge had erred in failing to take into consideration matters which he was bound to consider. By failing to do so his conclusion was against the natural sequence
I of logic and deduction that flows from these primary facts. Had he considered them, his inferences and conclusions might well have been different.

In all of the circumstances of this case, I am of the view that the sessions court judge had failed to give a critical appreciation of the evidence given by the witnesses and test it with the probabilities of this case and that no reasonable tribunal similarly circumstanced would arrive at the conclusion that he did. An appellate court can certainly interfere where the findings suffer from serious error, against the weight of evidence or drawing of inferences from the evidence if they are not legally sound.

In these circumstances, it is my finding that the plaintiff had discharged the onus of proving negligence on the part of the defendants and hold the defendants 100% liable for the accident. The plaintiffs' appeal was accordingly allowed with costs.

Quantum

According to the medical report from Taiping Hospital, Ipoh Hospital and specialist report of Klinik Orthopedik Gafoor, the first plaintiff sustained the following injuries:

(a) abrasion wound over the right knee;

(b) laceration wound over the scalp and right elbow;

(c) pain and swelling of right ankle;

(d) fracture at distal end of right tibia and fibula.

Disabilities: Marked limitation of right ankle joint movements. Unable to squat fully. Malunion of the fracture resulting n swollen right ankle joint with various deformity of the fibula. Limping gait due to stiff ankle and painful right ankle joint.

As for the second plaintiff, according to the medical report of the Taiping Hospital, the second plaintiff sustained the following injuries:

(a) swollen upper lip; and

(b) fracture at the middle of the third clavicle.

I do not propose to deal with this issue of quantum at length by reason of the fact that in the court below, the parties had agreed on quantum in respect of the injuries sustained by the plaintiffs. I accordingly made an order in terms of the agreed quantum as at p 33 of the appeal record which are as follows:

(a) First plaintiff

(i) pain and suffering: RM19,500;
(ii) loss of earnings: RM10,500;
(iii) special damages: RM187; and
(iv) interest at the rate of 8% from date of filing to date of payment of sum awarded in para (a) and (b) and interest at 4% on special damages from date of accident to date of payment of sum awarded in para (c).

(b) Second plaintiff

(i) pain and suffering: RM8000;
(ii) special damages: RM85; and

A (iii) Interest at the rate of 8% from date of filing to date of payment of sum awarded in para (i) and interest at 4% on special damages from date of accident to date of payment of sum awarded in para (ii).

Plaintiffs' appeal allowed.

B Reported by Lim Lee Na

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